No. 2892

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. MARSHALL, trustee in the matter of the estate of N. H. Hickman, bankrupt,
Appellant,

vs.

ELIZABETH NEVINS,
Appellee.

BRIEF FOR APPELLANT.

LLOYD S. ACKERMAN,
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Statement of the Case.

The appellant prior to this appeal was the plaintiff in an action to set aside a preference, and brought the action in his capacity as trustee of the estate of N. H. Hickman, bankrupt. The facts are that:

On January 14, 1916, an involuntary petition in bankruptcy was filed by certain creditors praying that N. H. Hickman be adjudicated bankrupt.

On January 26, 1916, Hickman filed an answer to said petition admitting the commission of an act

of bankruptcy under Section 382 of the Bankruptcy Act.

On February 2, 1916, N. H. Hickman was adjudicated a bankrupt.

On February 23, 1916, appellant was appointed by the Referee in Bankruptcy, trustee of the estate of N. H. Hickman, bankrupt, and at the time of the institution of the suit was the duly qualified and acting trustee.

On December 7, 1915, and for a long time prior thereto, Hickman was the owner of a 37/64 interest in the schooner "William Olson", and on said date, and for more than one year prior thereto, Hickman was insolvent. On December 7, 1915, Hickman transferred to the appellee a 73/128 interest in the schooner "William Olson", and said transfer was recorded in the Custom House of the United States, at San Francisco. Hickman in his answer filed in the bankruptcy proceedings admitted under oath the transfer of this property to the appellee while he was insolvent and with intent to prefer her over his unsecured creditors. At the time of the aforesaid transfer Hickman claimed to have been indebted to Mrs. Nevins, the appellee, in the sum of $8600, upon an indebtedness which was incurred prior to 1912. The appellee and transferee of the above described property was the mother-in-law of Hickman. Hickman in his bankruptcy schedule admitted debts in the sum of $36,934.40 and assets of

$50.00. The value of the schooner "William Olson" was the sum of $25,000, and at the time the transfer was made to the appellee was in active use and under charter and was earning large sums of money. The complaint charged that Hickman intended to prefer the defendant or appellee over his other unsecured creditors, and that at the time the transfer was made the appellee had reasonable cause to believe that the transfer would effect a preference, and also that Hickman had a present intent to prefer her over his unsecured creditors.

The sole issue in the case was whether or not the appellee had reasonable cause to believe that Hickman was insolvent on the 7th day of December, 1915, at the time he transferred to the appellee the interest in the schooner "William Olson", or that the appellee knew that Hickman intended to give her a preference over other creditors. All the other facts were admitted.

The evidence disclosed the following facts:

N. H. Hickman resided in San Francisco since 1890 and was married on October 5, 1897, to the daughter of the defendant or appellee. The appellee had her residence in Vallejo and since the date of her daughter's marriage resided alternately with her son in Vallejo, and her daughter in San Francisco, Mrs. N. H. Hickman. Since the date of Hickman's marriage he had been in many business activities, the lumber business, shipping business, amusement

concession business, drayage business, warehouse business, etc. He was president of the Bay Shore Drayage business, and his wife was the chief stockholder. He became president and manager of this company on the 21st day of May, 1909. This company continued in business until it became bankrupt in 1915. It never was a profitable business. In the fall of 1910 Hickman started a warehouse business, which was unprofitable, and which was closed in October, 1913. He was also interested in the Pacific Aeroscope Company, which never paid a dollar. From May, 1909, until 1912 Hickman had made some money out of the lumber business. Hickman admitted he had been insolvent since 1906. He resided for several years in a home on Page Street, which was owned by his wife. He claimed that he had never during the past few years had any conversation with his mother-in-law, the appellee herein, in regard to business matters, never spoke to her about them, and never discussed finances with her. She never asked him how he was getting along, but he had had financial transactions with her through Mrs. Hickman, his wife. On December 7, 1915, he was indebted to appellee in the sum of $8600 for money loaned. This money was borrowed over a period commencing in 1905. On the 15th day of February, 1912, he gave her a note to cover the indebtedness due her from February 15, 1908. Subsequent to 1912 he borrowed additional money from her. The appellee loaned Hickman money in the following amounts and on the following dates:

February	15, 1908	$1250.00
"	21, 1908	1250.00
October	17, 1908	500.00
"	24, 1908	2500.00
November	14, 1908	409.60
April	10, 1909	34.40
July	21, 1910	125.00
October	31, 1910	70.00
February	15, 1912, Interest	968.96
August	26, 1912	2500.00

Mrs. Nevins, the appellee, gave him money to pay his taxes, $34.40. He never paid her any interest at any time but the item of February 15, 1912, $968.96, is the amount of interest computed at the rate of 5% on the total amount of the indebtedness. Hickman gave the appellee credit for this sum. The Bay Shore Drayage Company, of which Mr. Hickman was the president, and Mrs. Hickman was the chief stockholder, was indebted to the appellee also in the sum of $2725. Hickman claims that he never asked the appellee for money in his life, and whenever he wanted money from her he spoke to his wife and she asked her mother. He paid Mrs. Nevins, the appellee, interest on the amount which he owed her from 1905 to 1909; paid no interest subsequent to that date. In 1914 Hickman was sued by the Albion Lumber Company for $1200. They obtained a judgment in 1914, which was never paid. Another judgment was obtained in June, 1914 or 1915, and was never paid.

Appellant then produced testimony, which is undisputed, that Hickman's general reputation in the community in which he lived for five years previous to the date of trial was that he was insolvent. Plaintiff introduced in evidence (plaintiff's exhibit No. 2) an agreement whereby the appellee agreed to defer collection of her claim against the Bay Shore Drayage Company in consideration of the advance of certain other moneys by O. H. Greenewald. O. H. Greenewald testified that he explained Hickman's financial condition to his wife and asked her to discuss the matter with her mother, and that Mrs. Hickman agreed to do so. Thereafter, Hickman reported to Greenewald that his wife had gone to see her mother concerning the matter. This took place in November, 1915. Greenewald had asked Hickman to transfer to him as security for Hickman's indebtedness to him his interest in the "William Olson". The following month Hickman transferred this interest to the appellee.

The appellee, Mrs. Elizabeth Nevins, then took the stand in her own behalf and testified that Hickman never spoke to her of business; that she loaned him money at her daughter's request; that she knew nothing at all about his business; that she is a woman of some means, attends to her own business affairs, has enjoyed an income of as much as four or five hundred dollars per month. That she never knew anything about Hickman's financial difficulty until she saw it in the paper the latter part of December, 1915; that she always had perfect confi-

dence in Hickman; that she never suspected that he was insolvent.

On cross-examination her testimony was so contradictory that it is almost impossible to put it in narrative form. She testified that she was worth about $15,000; that she never asked Hickman any questions about his business affairs, nor did she ever display any interest in them. When Mrs. Hickman wanted to borrow any money for her husband she would tell the appellee that Hickman needed equipment in his business, and asked for the money, and the appellee gave it to her. She never made inquiries as to what the money was required for, nor did her daughter tell her; she did not know what Hickman was doing. She loaned money to the Bay Shore Drayage Company, which she supposed was for Hickman's use. At the time she signed the contract referred to as plaintiff's exhibit No. 2, her daughter told her that Mr. Greenewald was going to assist her husband and that she, the daughter, wanted her, the appellee, to sign so that Greenewald could get his money first. She did not think she read the agreement before she signed it; she does not know what the agreement provides for. The agreement did not create suspicion in her mind as to Hickman's finances; she never thought anything about it. She knew that Hickman's business was the Bay Shore Drayage Company; she kept no books; she was in the habit of giving her daughter money to buy clothes with, or for anything she needed. She knew that Hickman needed money for his

business, and there was no one else to give it to him. Hickman repaid her the money that he borrowed many times prior to 1912. She did not remember whether he paid her back after 1912.

Hickman never spoke to her about the money he owed her or of the interest. The first she knew about the transfer of the interest in the "William Olson" made by Hickman to her in December, 1915, was when he told her that he transferred the stock to her. She never requested him to do it. She never discussed Hickman's business affairs with her son. She knew in the spring of 1915 that Hickman had placed a mortgage on the "William Olson"; she became managing owner of the "William Olson" after the transfer of the Hickman interest to her, and appointed Hickman as her agent.

Errors Relied Upon by Appellant.

Inasmuch as the opinion by the lower court held only that the defendant did not have reasonable cause to believe that a preference was intended and therefore ordered judgment for defendant, the assignments of errors, of which there are nine, are founded upon failure of the court to give the relief prayed for in the complaint and action of the court in awarding judgment for defendant. We therefore rely upon all the assignments of error set out on pages 99-101 of the transcript. Assignment of error No. 3 is typical. It reads:

"3. That the said court erred in its finding or decision that the above named defendant did not have reasonable cause to believe that the transfer or conveyance of the property described in the complaint to her by the bankrupt would result in a preference."

The Law of the Case.

The burden of proof in cases where a preference has been given to a near relative shifts to the defendant to show by satisfactory proof that the transaction was in good faith and without knowledge of the purpose and intention to give a preference.

In re Sanger, 169 Fed. 722; 22 A. B. R., 145.

In this case the sister-in-law of the bankrupt loaned him the sum of four hundred and fifty and no/100 (450) dollars. The bankrupt testified that the understanding was that security would be given. Therefore the complainant contended that the burden was upon the objecting creditors to show:

1st. That the bankrupt was insolvent at the time security was given.

2nd. That it secured to the complainant a greater percentage of her debts than was secured to any other creditor of the same class; and

3rd. That complainant had reasonable cause to believe that a preference was intended.

The court said:

"These three propositions so asserted, under ordinary circumstances, are sound and are up-

held by a multitude of authorities, but it seems to me a clear distinction is to be drawn as to the burden of proof in such cases between strangers asserting such claims and the assertion thereof by near relatives. In this case a sister-in-law on several different occasions loaned sums of money, without, it would seem, taking any note or obligation therefor at the time, and without being able even to recall the dates of such loans; but less than one month before a voluntary petition in bankruptcy is actually filed by the brother-in-law secures from him and his partner a negotiable note, which in no way discloses her connection with the debt, and the same is secured by a deed of trust in general terms to any holder thereof. It seems to me that such facts in themselves constitute prima facie evidence of knowledge both of the insolvency and the intention of the bankrupts to give her a preference over other creditors, and that, so establishing a prima facie case of knowledge, the burden is upon her, by satisfactory proof, to show that the transaction was in good faith and without knowledge of such purpose and intention."

The fact that the person to whom the preference is given is a woman wholly unacquainted with business knowledge is immaterial. The appellee in this case was required to exercise the discretion and prudence of an "ordinarily intelligent man", and if facts are shown which would have put a prudent business man on notice of Hickman's insolvency the appellee cannot plead failure to appreciate the significance of these facts. Her conduct is to be judged by the standard of what an ordinarily

intelligent business man would have done under the circumstances.

Wright v. Sampter, 150 Fed. 196; 18 A. B. R. 355.

The defendants were relatives of the bankrupt, and had money on deposit with him. They were women and unfamiliar with business matters. They had had money on deposit with the bankrupt for some time. The accounts were of long standing. Ten days prior to the petition in bankruptcy, the bankrupt paid these accounts in full.

> "It has frequently been said in actions turning upon the presence or absence of reasonable cause to believe a material or vital fact, that anything 'sufficient to excite attention and put a party on inquiry is notice of everything to which inquiry would have lead', and that known facts 'calculated to awaken suspicion' will justify an inference of actual and complete knowledge."
>
> *In re Knopf,* 16 Am. B. R. 432;
>
> *Parker v. Conner,* 118 N. Y. 24.

> "But obviously facts, whether producing certainty or merely suspicion, must have a mind upon which to operate and affect, and the rule is equally well established that it is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of an 'ordinarily intelligent man' (Grant v. Bank, 97 U. S. 80); 'a prudent business man' (Bank v. Cook, 95 U. S. 343; Toof v. Martin, 13 Wall. 40) 'a person of ordinary prudence and dis-

cretion' (Wager v. Hall, 16 Wall. 584); 'an ordinarily prudent man' (In re Eggert, 4 Am. B. R. 449); 'a prudent man' (Dutcher v. Wright, 94 U. S. 553).

"The peculiarity of this case is that the mind to be affected is that of a confiding niece, wholly unacquainted with business knowledge, and however intelligent and prudent in matters within her own experience, incapable of comprehending the significance of business facts, which would have been more than enlightening to men of the business world. It is therefore urged by the defendants that Barbour v. Priest, 103 U. S. 293, justifies the proposition that not only must the facts exist and be sufficiently impressive to make inquiry in such minds as are catalogued in the cases above cited, but they must be sufficient to impress their significance upon the mind of the person to be affected—in this case a woman leading a life apart from the world of business. It was indeed said in the case last cited (one inducing great sympathy for the preferred creditor) that it is 'necessary to prove the existence of this reasonable cause of belief * * * in the mind *of the preferred party*' (p. 296).

"But these words must be taken in conjunction with the whole opinion, which was written in express consonance with Grant v. Bank, supra, and the phrase quoted I take to assume in 'the preferred party' the mind of 'an ordinarily intelligent man'.

"It would be intolerable that the voidability of a preference should depend not upon the effect of facts admittedly or by proof known to a defendant, but upon the degree of intelligence or experience which such defendant was capable of exercising in respect thereto; such

a rule would put a premium upon ignorance and encourage the assumption thereof."

Grant v. National Bank of Auburn, 37 A. B. R. 329-342;

Matter of Gaylord, 35 A. B. R. 544;

Stern v. Paper, 25 A. B. R. 451;

Patterson v. Baker Grocery Co., 33 A. B. R. 740.

If Hickman's inability or failure to meet his obligations, or any other facts of a suspicious nature shown by the testimony, would have led a prudent business man to make inquiries as to his solvency and the appellee failed to make such inquiries, the transfer was void.

In *Re John J. Coffey,* 19 A. B. R. 148:

"Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor, as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business. When they are fairly put upon inquiry, and have neglected to make it, they are justly chargeable with all the knowledge it is reasonable to suppose they would have acquired if they had performed their duty as required by law. And he who deliberately shuts his eyes and ears to means of knowledge, and as to matters which he says 'he is not interested in' has reasonable ground to believe what ordinarily diligent inquiry could ascertain. 'Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances, is notice of all the facts

which a reasonably diligent inquiry would develop.' And such notice is reasonable cause for relief."

In *Re C. J. McDonald and Sons,* 24 A. B. R. 446:

The court holds that if the creditor failed to investigate, he is chargeable with all knowledge which it is reasonable to suppose he would have acquired if he had performed his duty in that regard and when the bankrupt pays his entire estate and one creditor alone is benefited thereby, there is a strong presumption of unlawful preference.

In *Ogden v. Reddish,* 29 A. B. R. 543:

"The defendant company, at the time the mortgage was executed, had at least this much knowledge as to the bankrupt's financial condition. It knew that he was heavily in debt to it on an account long overdue and bearing interest, and that so far at least as it was concerned he was not able to meet his obligations as they became due. It knew what real estate he owned, and that with the execution of its mortgage it all became encumbered nearly at least to the amount of its value. And it also knew the extent of his indebtedness, and that it was a large indebtedness. All this knowledge except that as to ability to meet his obligations, was obtained at the time the mortgage was executed from inquiry and investigation. It may be said to come short of knowledge of the fact that the bankrupt was insolvent and the mortgage covered a greater percentage of his property than it was entitled to. And it may be conceded, for the sake of the argument at least, that this knowledge was not such that the reasonable inference therefrom was that the bankrupt was insolvent and the mortgage covered

such greater percentage; i. e. it was not such that the reasonable effect thereof was a belief that such was the case. It may be taken for granted further that its action in the matter was not such as to show that it did so believe, from which it might be inferred that it had more knowledge than the evidence discloses. *It would seem to be certain, however, that it feared that the bankrupt was insolvent. The evidence which it had was calculated to create such fear, and it acted as if it did so fear. It did so in not inquiring or making any examination as to the bankrupt's assets after it had ascertained the extent of his liabilities.* The failure so to do can reasonably be accounted for on the ground that it feared that he was insolvent and it can be accounted for on no other ground. It must have known that if the bankrupt was insolvent, and it knew him to be so, its mortgage would be invalid. It did not then know he was insolvent. Further inquiry, or an examination of the stock and books, might reveal that he was. By refraining therefrom it would be in a position to claim that it did not know, or had no reasonable cause to believe, that the mortgage would effect a preference. Otherwise, in the natural course of things, it would have so inquired. It was considerably interested in his condition. The knowledge which it had was calculated to awaken suspicion, if not fear, of insolvency, and the means of ascertaining were right at its hand. Notwithstanding it stayed the inquiry. It is reasonable to conclude, therefore, that though it may not have believed, or had reasonable cause to believe, that the bankrupt was insolvent, it feared that he was, and it so feared it that it shut its eyes to the truth in regard to the matter."

Analysis of the Testimony.

Having shown from the authorities that the burden of proof in this case is upon the appellee to show that the transaction was in good faith, and without knowledge on the part of Hickman's intent to prefer her, it will profit us to closely examine the appellee's testimony to determine whether or not this burden was fairly sustained. A careful review of the testimony is justified in cases of this kind as the courts have uniformly declared that no set rule can be laid down as to what constitutes reasonable cause to believe.

> "Each case stands pretty much on its own bottom."
>
> *In re Wolf & Co.,* 21 A. B. R. 83.

To begin with we have shown that in actions of this kind the presence or absence of "reasonable cause to believe" is determined by definite considerations. The following rules are established by the authorities above quoted:

1st. Anything sufficient to excite attention and put a party on inquiry is notice of everything to which inquiry would have led.

2nd. Known facts calculated to awaken suspicion will justify an inference of actual and complete knowledge.

3rd. In cases where the preference is given to a near relative the burden of proof shifts from plaintiff to defendant to show that the transaction was in

good faith and without knowledge of the purpose to prefer.

4th. It is sufficient if the facts brought home to the person sought to be affected are such as would produce action and inquiry on the part of "an ordinarily intelligent man", "a prudent business man", a person of ordinary prudence and discretion.

5th. The fact that the party to whom the preference was made is incapable of comprehending the significance of business facts and is wholly unacquainted with business knowledge is no defense.

Now let us inquire what facts are generally assumed to be of a nature to put a prudent business man upon inquiry as to the solvency of a person with whom he has business relations. Of first importance is the ability of the subject to meet his obligations, the promptness with which he pays interest on loans, his general financial reputation in the community in which he lives, his requirements in the line of accommodation, his standing with his bank, the financial standing of the corporation or business with which he is identified, his reputation as a successful business man, the prosperity of the business to which he devotes his time or in which he is financially interested, suits which are prosecuted to judgment against him and whether or not the judgments are paid, and a variety of circumstances and opportunities of observation which are noted and their significance appreciated by the "prudent business man".

We have shown that from Hickman's admission he was insolvent since 1906 (p. 18 trans.); that he commenced borrowing money from his mother-in-law in 1905 (p. 20, trans.); that since 1912 he paid his mother-in-law no interest on the note of $6100 (p. 26 trans.); that in 1914 the Albion Lumber Company obtained judgment against him for $1200, which was never satisfied (p. 29); that his reputation in the community in which he lives was that he has been insolvent for five years (p. 40).

Turning to the testimony of Mrs. Nevins we wish to state our firm belief that from beginning to end her testimony is studiously evasive and downright dishonest. It bears unmistakable evidence of a deliberate, painstaking and well schooled determination to adhere to a fatuous pose of ignorance, inexperience and unworldliness. It is characterized by an apparent simplicity and innocence which defies the imagination. Mrs. Nevins is 64 years old, and the bare fact of having lived that long belies the pose of sublime idiocy which she assumed at the trial.

Let us first take her testimony regarding financial affairs on direct examination:

"Q. Have you considerable means?
A. Well, some.
Q. What is the source of your income?
A. I have rents; I have sugar stock; I have interest money.
Q. During the last eight or ten years what has been your average monthly income, about?
A. It has been as high as 400 or 500 a month; at present it is less; it is not so much.

Q. About what are your average expenses?
A. *I do not have any.*
Q. Practically no expense?
A. No." (All on p. 53 of trans.)

On cross-examination.

Q. Mrs. Nevins how much money have you; what would you say you are worth financially?
A. I could not say.
Q. In order to determine that you would have to appraise the various stocks that you have, is that a fact?
A. Yes, sir.
Q. Tell me approximately how much money are you worth?
A. It is kind of hard for me to do that.
Q. It is very embarrassing for me, but please tell me how much money are you worth?
A. Do you mean for how long—how many years? I do not understand what you want me to say.
The COURT. How much do you regard yourself as being worth in a general way?
A. *Ten or $15,000.*
Q. Ten or $15,000?
A. Yes, sir. (pp. 58-59 trans.)
Q. Is it not a fact that in comparison to the amount of your property a difference or sum of ten or $12,000 is quite a large portion of it?
A. No I have more than that; I think that is what is left remaining to me.
Q. You have about that much left?
A. That is what I think, as near as I can count it." (p. 74 trans.)

On redirect examination, pp. 93-94, the witness answered readily and precisely that her personal fortune was made up as follows:

Money in bank	$ 4,300.00
Real estate, Vallejo	10,000.00
Real estate, San Francisco	8,000.00
Note of her son	15,000.00
Stocks	2,850.00
Interest in "William Olson"	3,000.00
Total	$43,150.00

We ask that the court observe the reluctance with which the witness responded to the questions on cross-examination and how glibly she replied to her own counsel. When the court interposed to ask her how much she was worth, precisely the same question as had just previously been asked by counsel for the appellant, the witness replied to the court "ten or $15,000"; to counsel for appellant she answered, "I could not say", and to her own counsel she figured $43,150.00.

The witness was asked what her average expenses were. She replied, "I do not have any" (supra, and p. 53 trans.).

On page 63 she testified that her average expenses ran from $50 to $120 per month.

The witness testified about advances or loans which she had made to her son, as follows:

> "Q. Have you given your son any money during the past few years?
> A. Yes, sir.
> Q. How much?
> A. Ten or $12,000. I gave him money to help out to buy a piece of property or something of that kind. (p. 57.)
> * * * * * *

Q. Has he ever paid you back?
A. No.
* * * * * *
Q. You do not know how much he (the son) owes you at the present time?
A. No."

It will be perceived that in her set determination to plead absolute ignorance of financial matters she admits that her son borrowed ten or 12,000 dollars, never paid it back—and yet she does not know how much he owes her.

Referring now to the witness' testimony as to her knowledge of Hickman's affairs we find her saying on her direct examination:

"I never knew anything about his affairs until I saw it in the paper.
That was in December.
Q. December, 1915?
A. Yes, sir.
Q. What was it that you saw in the paper?
A. Something about bankruptcy, something about a sale of the Bay Shore Drayage Company.
Q. And Mr. Hickman's name was mentioned?
A. I knew it was him from reading it." (p. 54 trans.)

Compare that to the following:

"Q. What business was Mr. Hickman engaged in during 1915?
A. I do not know what he was doing.
Q. Did he have anything to do so far as you know, with the Bay Shore Drayage Company?
A. I never asked him. I do not know.

Q. Did you ever loan any money to the Bay Shore Drayage Co.?

A. Yes, some money.

Q. Who did you give it to?

A. To my daughter.

Q. For what purpose?

A. I suppose for his use.

Q. Did you know that Mr. Hickman was connected with it?

A. *Yes I suppose that he wanted it to buy horses or buy hay.* (pp. 69-70.)

Q. I am referring to the occasion where you loaned the money, did you make inquiry or were you told what the Bay Shore Drayage Company needed money for?

A. At what time?

Q. I understand it was within the last few years?

A. I suppose to buy equipment.

Q. On what do you base that supposition—were you ever informed what it was needed for?

A. *No. I knew that he was starting out in business and that he needed it.*"

After stating positively that she did not know what business Hickman was engaged in she flatly contradicts herself by admitting that she knew that the Bay Shore Drayage Company was his business.

In 1915 she signed an agreement agreeing to defer the collection of her claim against the Bay Shore Drayage Company in favor of O. H. Greenewald's claim for money to be advanced. Hickman was a party to this agreement (p. 71 trans.).

Now it appears that she knew nothing about Hickman's affairs until December, 1915, when she saw in the paper that the Bay Shore Drayage Company was bankrupt. She knew it was Hickman

from reading the paper (p. 54). She did not know in what business Hickman was engaged in 1915 yet she signed an agreement in which she, Hickman and the Bay Shore Drayage Company were parties. She had loaned money prior to 1915 to the Bay Shore Drayage Company at her daughter's request for Hickman's use. She *did* know that Hickman was connected with the Bay Shore Drayage Company because she supposed that he wanted the money to buy horses or buy hay.

On page 70 she testifies regarding this agreement:

"Q. Who asked you to sign that paper?
A. I don't remember—my daughter.
Q. Did you have any discussion with her about the paper at the time.
A. Yes, sir. She told me Mr. Greenewald was going to assist her husband and she wanted me to sign that so that he could get his money first.
Q. Assist her husband in the Bay Shore Drayage Company?
A. I suppose so, yes. (p. 70.)
Q. Did you ever ask her when she requested a loan of money from you what they needed the money for?
A. She told me.
Q. What did she say?
A. She said that Mr. Greenewald was going to assist them but he wanted to get his money first." (p. 87.)

We pause here to remark that viewing Mrs. Nevins' conduct according to the standard set by the authorities that of a prudent business man, is it conceivable that Mrs. Nevins was not "fairly put upon inquiry" as to Hickman's solvency when

she was told by her daughter that "Greenewald was going to assist her husband" and when she was required to sign an agreement temporarily relinquishing her right to collect her claim against the Bay Shore Drayage Company. She knew that this company was Hickman's. No other conclusion is possible from the testimony quoted.

> "Q. Didn't you say to Mrs. Hickman at any time, 'Is Mr. Hickman getting along all right'?
>
> A. She did not mention anything about his business to me." (p. 72.)

Yet the witness had sufficient knowledge of business to know that Hickman wanted the money to buy horses or hay (p. 70). She even knew that her daughter was a stockholder (p. 89). She knew that he needed money for equipment for the Bay Shore Drayage Company (p. 76). She was a stockholder herself in the Bay Shore Drayage Company (pp. 91-92). She considered the drayage business Hickman's business and spoke of it invariably as his business (p. 87): "I knew that he was starting out in business and that he needed it". Let this be compared to the assertion on page 81, "I did not know anything about his affairs at all—he never talked about his affairs", and on page 77, "We never discussed business at all", and on page 54, "I never knew anything about his affairs until I saw it in the paper", and on page 53, "I knew nothing at all about his business".

We might continue these excursions into the contradictions, inconsistencies and improbabilities of the appellee's testimony until we had copied the entire transcript into the brief. The foregoing, we feel confident, sufficiently demonstrates the truth of the observations that we permitted ourselves at the commencement of the discussion of Mrs. Nevin's testimony. One or two or even three of these striking contradictions might be condoned on the score of nervousness under cross-examination or a failure to duly comprehend the meaning of questions addressed to her, but when these contradictions are carried throughout her testimony, when every assertion of any importance that she made is proven by her subsequent statements to have been untrue her testimony is justly subjected to the gravest misgivings. She was in various ways intimately connected with Hickman's business career. She was a stockholder of the Bay Shore Drayage Company, a part owner of the "William Olson", a party to the agreement between Hickman, Greenewald and the Bay Shore Drayage Company, and the owner of $8600 of Hickman's paper. She endeavored to maintain an attitude of entire ignorance regarding all his affairs totally disregarding all signs which pointed to Hickman's financial distress. Hickman personally was indebted to her in the sum of $8600, the Bay Shore Drayage Company in the sum of $2725, a total of $11,325 without interest or more than one-fourth of her entire fortune.

APPELLEE MUST BE CHARGED WITH ANY KNOWLEDGE OF HER DAUGHTER WHO WAS HER AGENT.

The court must have noted from the foregoing extracts from the testimony that Mrs. Nevins and Hickman testified that they never had any business dealings together whatever. That all of the money which was borrowed from Mrs. Nevins by Hickman was given to Mrs. Hickman. Hickman insists that he never discussed financial affairs with Mrs. Nevins, and Mrs. Nevins likewise stated repeatedly that she never spoke to Hickman about business. All the money which was loaned to Hickman was given to her daughter (pp. 19-27-36-37-52-53-62-70-87 of trans.). Her daughter had access to her safe deposit box (pp. 89-90). We contend that the appellee must not be permitted to hide behind this transparent mask and that if she persistently refused to discuss business with Hickman, although she was loaning him money and conducted all her business transactions with him through her daughter, then, unquestionably, her daughter acted as her agent in these financial matters, and any knowledge which her agent had must be imputed to her. That Mrs. Hickman knew of her husband's financial condition cannot be questioned in the light of the testimony of O. H. Greenewald appearing on pages 44 and 45. This witness stated that he told Mrs. Hickman what conditions existed regarding Hickman's finances; that Hickman was indebted to him in certain sums

which he specified at the time and told her he wanted a settlement. He wanted Mrs. Hickman to thoroughly understand the conditions about Hickman's finances. He told her he had advanced about $10,000 to the Bay Shore Drayage Company and that he had guaranteed a note for Hickman at the bank, and that Hickman owed certain other notes, and that he, Greenewald, "thought he should have a preference". It should not be necessary to cite cases to the point that an agent's knowledge is knowledge of the principal. The case of *In the Matter of Stone,* 37 A. B. R. 138, was one where the knowledge of the son was imputed to the father who was the person as to whom the preference was sought to be set aside. The court said:

> "I am fortified in this view by the total failure on the father's part under the circumstances in this case, to make reasonable inquiries, and because the knowledge of the son is to be imputed to the father." (p. 142.)

To the same effect are

In re Herman, 31 A. B. R. 243, 207 Fed. 594;
Babbitt v. Kelly, 9 A. B. R. 335;
In re Nassoi, 15 A. B. R. 793;
Hewitt v. Boston Strawboard Co., 31 A. B. R. 652; 214 Mass. 260;
Collett v. Bronx National Bank, 30 A. B. R. 599; 205 Fed. 370;
Remington v. Bankruptcy, 1412.

TESTIMONY SHOWING THE KNOWLEDGE AND INTENT OF THE PARTIES TO THE TRANSFER OF THE "WILLIAM OLSON" CONSIDERED WITH REFERENCE TO THE QUESTION WHETHER OR NOT THE APPELLEE KNEW SHE WAS RECEIVING A PREFERENCE.

The evidence shows that Hickman intended to prefer the appellee over his other creditors when he transferred to her his interest in the William Olson in December, 1915 (p. 48). After the transfer to the appellee of the "William Olson" he continued to be its managing owner as agent of the appellee (pp. 49-91).

The appellee was asked on direct examination the following questions:

> "Q. The transfer of Mr. Hickman's interest in the William Olson—that was made to you in consideration for the indebtedness that Hickman owed to you, is that correct?
>
> A. That is what he told me.
>
> Q. For the promissory notes—the two sums of money that he owed you on that date, is that correct.
>
> A. I think so." (p. 55.)

It further appeared that the appellee made no investigation as to what the effect would be of the transfer of this property to her. It was admitted by the pleadings that the "William Olson" was the only asset which Hickman owned at the date the transfer was made.

On page 80 the appellee was asked the following questions:

> "Q. Did you make any inquiries of Mr. Hickman about the William Olson before you purchased it in December, 1915?

A. No, I never spoke anything about it.
Q. You never spoke to him about it at all.
A. The first I knew about it was when he told me he transferred the stock to me.
Q. You did not know anything about it before that time?
A. No.
Q. You never requested him to do it?
A. No."

Where the party to whom a preference is given knows or could upon inquiry have ascertained that the transfer included or comprised all the available property of the bankrupt, the transferee will be presumed to have known that a preference was intended. The law does not permit the transferee to passively accept the preference without realizing or attempting to realize the nature of the transaction.

As was said in *Coder v. McPherson,* 18 A. B. R. 523; 152 Fed. 951:

> "Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

In the case of *In re Hines,* 16 A. B. R. 499; 144 Fed. 142, the court said in speaking of a transfer of all of the property of the bankrupt to the defendant:

> "In thus monopolizing the last available asset that the debtor had to deal with he could but know he was getting more than his share if Hines proved insolvent, to which everything pointed. Of this he took the risk and now

that it has gone against him he cannot be heard to say that he did not know that he was getting a preference or that one was contemplated. When that is a necessary result of a transaction it is conclusively presumed to have been intended. And it was sufficiently evident to hold him responsible that that would be the outcome here."

Similarly in the case of *English v. Ross,* 15 A. B. R. 374; 140 Fed. 630, the court said:

"Monopolizing as he thus did all the available assets of the bankrupt the defendant could not but know that he was getting more than his share if Mangan (the bankrupt) proved insolvent, to which everything pointed, and of which he was therefore effected with notice. Of this the defendant took the risk and now that it is proved against him he cannot be heard to say that he did not know that he was getting a preference or that one was contemplated; where that is the necessary result of a transaction it is conclusively presumed to have been intended."

THE CASE OF IN RE HERMAN.

We have now reviewed the evidence sufficiently to demonstrate to the court that the facts of this case bring it within the decision of

In re Joseph L. Herman, 31 A. B. R. 243; 207 Fed. 594.

In this case the trustee filed objection to the allowance of the claim of Mrs. Crocker who was, as in the case at bar, the mother-in-law of the bankrupt. The bankrupt had borrowed from Mrs. Crocker

various sums for which he executed and delivered his promissory notes. With the money so borrowed he engaged in the grocery business. This venture was unprofitable. In the latter part of December, 1910, Mrs. Crocker went to Pasadena and remained there until the last of August, 1912, when she returned to Clarence, Ia., the home of the bankrupt. During her absence she was in frequent correspondence with her daughter, the wife of the bankrupt. About the middle of June, 1912, the bankrupt being in need of more money to continue his business requested his wife, the daughter of Mrs. Crocker, to write to her in Pasadena asking for another loan of $500. The wife wrote to her mother as requested and the mother answered saying she would make the loan but thought she ought to have a mortgage to secure her. A few days later the bankrupt's wife received by mail from her mother $500 in money. The court says that the evidence as to the last loan of $500 is so improbable that it at once challenges one's belief in its truth.

> "Of this it may be said that there is no way that it could be directly disputed, that direct evidence disputing them is not essential and that their testimony could be disproved by the circumstances of the transaction and other circumstances as effectually as by direct testimony."

Mrs. Crocker was 76 years old and was a business woman. The loan was made on July 1, 1912. A mortgage was given to her by the bankrupt on August 12, 1912.

"No part of the mortgage was therefore for a present consideration but was wholly to secure an antecedent indebtedness owing by the bankrupt to his mother-in-law. That it was made pursuant to an agreement to make the same when the loans were made does not relieve it from operating as a preference if the other essentials of a voidable preference required by the act are present. * * * That Mrs. Crocker had reasonable grounds to so believe (that the bankrupt was insolvent) is entirely clear under the testimony, she had loaned the bankrupt the first $1000 to enable him to purchase a small stock of groceries and engage in a grocery business in Clarence. He had no means other than the $1000 so borrowed from her with which to purchase the stock and engage in such business, and this she knew. *In June, 1912, without having paid any part of the principal of this loan, nor does she or the bankrupt testify that the interest had then been paid* upon the $1000 (though Mrs. Crocker credited a year's interest upon the notes in her amended proof) he requested his wife to ask her mother for another loan of $500 to carry him over until fall. The request for this loan and the promise to make the mortgage was made through Mrs. Herman, the bankrupt's wife. The fact that no part of the prior loan had been paid, that it was then 9 months past due, with the request for an additional loan of $500 to carry him over until fall, was sufficient to put her as a reasonably prudent person upon inquiry as to his then financial condition, and she was then chargeable with all the information that such an inquiry would have disclosed. If such inquiry had then been made there can be no doubt that it would have disclosed that the bankrupt was hopelessly insolvent, that he was being pressed by the bank for the payment of its debt; that he was unable to

do so and that the mortgage was intended as a preference to Mrs. Crocker over the bank and other creditors of the bankrupt.

"Again Mrs. Herman acted for her mother in requiring the promise that a mortgage should be given by the bankrupt when the last loan was made (if it was made) and when the mortgage was recorded it was delivered to her to be forwarded to her mother. To hold that she had no reasonable grounds to believe when she so received and forwarded the mortgage that it was intended as a preference to her mother, would be to disregard the testimony and sanction a deliberate violation of the bankruptcy act."

If it be correctly held in the foregoing case that the request of the bankrupt for an additional loan, and the fact that no part of the prior loan had been paid, nor any part of the interest, that it was then nine months past due put the transferee as a reasonably prudent person upon inquiry as to the financial condition of the bankrupt, then the case at bar appears to be far more convincing. Not only had Hickman failed to pay principal and interest for more than seven years but he had approached Mrs. Nevins with the agreement of the Bay Shore Drayage Company whereby she was to defer the collection of her claim against this company so that the company could get financial assistance from another source. As appellee testified on page 70:

"She (the daughter) told me Mr. Greenewald was going to assist her husband and she wanted me to sign so that he could get his money first.

Q. Assist her husband in the Bay Shore Drayage Company?
A. I suppose so, yes."

As has been shown the appellee knew that the Bay Shore Drayage Company was Hickman's business and she knew *that he needed assistance.* We contend that the bare fact that no part of the principal or interest on the indebtedness which was fully due early in February, 1912, was in itself enough to put the appellee on inquiry and that she is chargeable in law with all facts which such inquiry would have disclosed. Hickman admitted he had been insolvent since 1906 (p. 18). It is certain that appellee could easily have ascertained this information as to Hickman's insolvency from Hickman himself had she spoken to him about it but she chose to remain silent and to discuss no business matters with him whatever.

We charge that Mrs. Nevins, "a prudent business man" was put on inquiry as to Hickman's insolvency by the following facts and circumstances:

First. That Hickman owed her a large sum of money prior to 1908 which he paid with interest.

Second. That he continued to borrow from her from 1908 to 1912 various sums none of which he repaid.

Third. That he paid her no interest from 1908 to the date of trial.

Fourth. That he borrowed $2725 from her subsequent to 1912 for the Bay Shore Drayage Co.

Fifth. That no interest was paid on this amount of $2725.

Sixth. That she knew that Hickman needed "assistance" in the Bay Shore Drayage Co. when the Greenewald agreement was signed by her.

Seventh. That she knew that Greenewald was going to "assist" Hickman.

Eighth. That she knew of no means of livelihood that Hickman had other than the Bay Shore Drayage Co., and the William Olson, and that she knew that neither paid any dividends because she herself was interested in both (p. 78).

Ninth. That unpaid judgments were on record against Hickman and that any inquiry as to his finances would have disclosed this fact.

Tenth. That Hickman's general reputation was that of an insolvent.

Eleventh. That during a period of seven years Hickman paid neither principal or interest of his debts to her until December 7, 1915, when he transferred to her all his property, to wit, his interest in the William Olson voluntarily, without solicitation on her part, and that this transfer in itself was sufficient to put her on notice of his insolvency.

There can be to our mind not the slightest doubt that the common dictates of prudence demand that a business man to whom is owing a large sum of money representing one-fourth of the subject's capital who receives for a period of three years no payment of principal or interest is required in law

to investigate the financial condition of his debtor, to make some effort to collect and is charged with notice of a preference when suddenly without solicitation on his part the debtor makes over to him a valuable property and demands the return of his notes.

In any case where it is sought to set aside a transfer or preference given by one member of a family to another it is a difficult thing to prove knowledge on the part of the transferee of facts which would reasonably induce her to believe that the transferrer was insolvent. The trustee in bankruptcy cannot look into the minds of the parties to the transaction to determine exactly the extent of their knowledge and intent. The only proof which need be adduced in a case of this kind is to show the existence of significant facts, circumstances and general repute affecting the reputation of the bankrupt for solvency which were either known to the transferee or which by the exercise of common diligence might have been ascertained. The law gives to the trustee in this case the benefit of the doubt and because of the intimate relation of the parties to the unlawful transfer, it causes the burden of proof to shift to the appellee to show by competent evidence that the transaction was in good faith and without intent to prefer in what manner has this burden been borne by the appellee. By affecting a pose of ignorance, by shutting her eyes to every fact and circumstance which if seen would have put her upon inquiry, by closing every

avenue of investigation with a purposeful indifference and by insistently resorting to her assumed lack of business experience as her reason for failing to appreciate the significance of facts known to her. If this court should place the stamp of its approval upon such conduct and such a transaction by affirming the decision of the District Court the result would be to invite similar transactions in future between other bankrupts and other mothers-in-law. This is a situation of such common occurrence, that of a bankrupt owing a large number of creditors and among them some female member of his family, who is wholly unfamiliar with business practises, that to permit the bankrupt to deliberately transfer all his assets to the relative in payment of a past due indebtedness with a present intent on the part of the bankrupt to prefer her would be affording a cloak for fraud which would be frequently worn by designing and dishonest persons.

We submit that the judgment of the District Court should be reversed and that this court decree that the transfer of the 73/128 interest in the schooner "William Olson" by N. H. Hickman to appellee was an unlawful preference, that said transfer be annulled and set aside, that appellee be directed to make, execute and deliver to appellant a reconveyance or transfer of said 73/128 interest in said schooner "William Olson" and that appellee be directed and required to account to appellant for the rents, issues and profits thereof from the

7th day of December, 1915, and that appellant have judgment for his costs herein incurred.

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

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